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June 1, 2005

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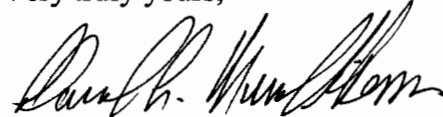
Re: Tentative Cleanup and Abatement Order No. R9-2005-0126

Chairman Minan:

On behalf of National Steel and Shipbuilding Company ("NASSCO"), we are filing the attached Motion to Compel Production of Evidence and Renewed Motion for Continuance of Public Workshop requesting that the Board order staff to produce to NASSCO the evidence it purports to rely upon to reach the findings and conclusions of the above-captioned order, and to continue the workshop planned for June 29, 2005.

Please contact me if you have any questions or comments.

Very truly yours,



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of LATHAM & WATKINS LLP

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SAN DIEGO REGIONAL
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10
11 **IN THE MATTER OF:**

12 NATIONAL STEEL AND
SHIPBUILDING COMPANY
13 CLEANUP AND ABATEMENT
14 ORDER NO. R9-2005-0126

ORDER NO. R9-2005-0126
FOR
CLEANUP AND ABATEMENT

PUBLIC WORKSHOP
JUNE 29, 2005

**MOTION TO COMPEL PRODUCTION OF
EVIDENCE
AND
RENEWED MOTION FOR CONTINUANCE
OF PUBLIC WORKSHOP**

SAN DIEGO REGIONAL
WATER QUALITY
CONTROL BOARD
2005 JUN - 1 P 3:33

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1 **I. RELIEF REQUESTED**

2 **A. The Regional Board Must Continue Any Adjudicatory Proceeding Until It**
3 **Has Provided NASSCO With An Evidentiary Basis For The Cleanup And**
4 **Abatement Order And A Meaningful Opportunity To Review That Evidence**

5 National Steel and Shipbuilding Company ("NASSCO") hereby renews its
6 request for a continuance of the workshop, currently set for June 29, 2005, on tentative Cleanup
7 and Abatement Order No. R9-2005-0126 ("Draft CAO") and also moves to compel the
8 production of evidence that the San Diego Regional Water Quality Control Board ("Regional
9 Board" or "Board") staff is relying upon for that same order. This application is made on the
10 grounds that Board staff continues to refuse to provide any evidentiary basis for the Draft CAO
11 (whether in the form of a staff report or otherwise) before the workshop, an adjudicatory
12 proceeding. The Regional Board is also now requiring, despite the absence of a staff report,
13 written comments to be submitted by June 15th. Consequently, the process continues to be
14 fatally flawed by the staff's failure to provide a meaningful opportunity for NASSCO and the
15 other Potentially Responsible Parties ("PRPs") to respond, either in writing or at the workshop,
16 to the Draft CAO.

17 For the reasons discussed below, the Board must continue the workshop and
18 deadline for submission of written comments indefinitely until NASSCO is provided a
19 meaningful opportunity to address the bases of the Draft CAO. The workshop should be held no
20 sooner than 90 days after the Board provides the basis to support the currently unsupportable
21 Draft CAO, be it in a staff report or other compilation of evidence.

22 **B. No Proceeding May Be Held Before Board Members Until Evidence Relied**
23 **Upon By Board Staff For The Draft CAO Is Provided**

24 In the event the Board staff again declines to provide NASSCO with the evidence
25 relied upon to support the Draft CAO, NASSCO requests that the June 29th workshop be
26 conducted without the presence of Regional Board members. A true workshop modeled on the
27 format traditionally and frequently employed in this and other proceedings will avoid
28

1 compromising the Board's independent adjudicatory role or the integrity of the adjudicatory
2 process.

3 **II. ANY REGIONAL BOARD PROCESS SEEKING TO IMPOSE AN**
4 **UNNECESSARY AND UNJUSTIFIED \$100 MILLION CLEANUP ORDER MUST**
5 **AFFORD FULL STATUTORY AND DUE PROCESS RIGHTS TO THE**
6 **POTENTIALLY RESPONSIBLE PARTIES**

7 **A. The Public "Workshop" In Fact Has Become An Adjudicatory Proceeding**

8 An "adjudicative proceeding" is "an evidentiary hearing for determination of facts
9 pursuant to which an agency formulates and issues a decision." Cal. Gov't Code § 11405.20
10 (2005); 23 Cal. Code. Regs. § 648 (2005). Based upon the notice issued by the Board on May
11 23, 2005 (although greatly lacking in details), it appears as though Board staff intends to conduct
12 the June 29th workshop with Regional Board members in attendance. Since the hearing notice
13 makes clear that the Board members will be present, any discussion of the Draft CAO at the
14 workshop will influence Board members in formulating and ultimately issuing a decision.

15 The one-sided presentation will clearly affect the Board's determination of the
16 validity of the findings and conclusions and therefore its ultimate decision. The influential
17 impact on the Board is compounded by the inability of the public and the PRPs to present an
18 informed opposing viewpoint in the absence of any basis for understanding what evidence staff
19 conceivably could be relying on, out of public view, that conceivably could justify this tentative
20 cleanup and abatement order. Moreover, the Board members themselves will have no evidence
21 whatsoever before them which would allow for their informed consideration of the potential
22 findings and conclusions. Hence, this workshop is clearly an adjudicatory proceeding and
23 cannot commence without disseminating, well in advance, the evidence to be considered.

24 While the May 20th public notice rescheduling the workshop notes that "[t]he
25 objective of the workshop is to provide an opportunity for the public to provide comments to
26 Regional Board members on the [Draft CAO]," the proposed proceeding clearly fails to meet this
27 objective. The public, and more importantly the PRPs, cannot possibly provide substantive
28 comments when the evidentiary basis for the Draft CAO has not been revealed in a timely
manner.

1 Therefore, labeling the June 29th proceeding a “workshop” ignores the absence of
2 the give-and-take structure associated with a workshop. Instead of providing a meaningful
3 opportunity to utilize those tools, the proceeding is instead a calculated attempt by Board staff to
4 convince Board members to support, without any evidence, the proposed findings and
5 conclusions of the Draft CAO while knowing full well that the PRPs cannot adequately address
6 the Draft CAO. It is completely irrelevant that, as the public notice observes, there will not be a
7 vote on June 29th. Regardless of its label, or whether the ultimate decision is deferred to a later
8 date, the format of the June 29th proceeding means that it begins the adjudicatory proceedings
9 against the PRPs.

10 **B. The Regional Board Has Completely Abrogated Its Responsibility To Ensure**
11 **Full And Fair Adjudicatory Proceedings**

12 **1. The Regional Board Must Provide Evidence Supporting The Cleanup**
13 **And Abatement Order Prior To Any Adjudicatory Proceeding**

14 Although the Regional Board has continued the workshop, the Board has
15 indicated that it still will not provide a staff report prior to the (now June 29th) workshop, and
16 perhaps not even before any subsequent formal hearings by the Board. The Draft CAO fails to
17 provide even one reference to any supporting evidence in the administrative record, let alone a
18 staff report describing how staff purports to have reached its conclusions. Rather, the PRPs are
19 left to blindly defend against the allegations in the Draft CAO. As discussed in our previous
20 Motion for Continuance of Public Workshop and Hearing filed on May 12, 2005, such a process
21 violates NASSCO’s statutory and due process rights. We renew our objections here.

22 **a. The Statutory Requirement: Topanga’s First Step Requires An**
23 **Agency To Develop Substantial Evidence To Support Its**
24 **Findings**

25 Pursuant to Section 1094.5 of the California Code of Civil Procedure, an
26 administrative agency rendering an adjudicatory decision must support its findings with
27 substantial evidence in the record. Topanga Assn. for a Scenic Cmty. v. County of Los Angeles,
28 11 Cal. 3d 506, 514 (1974). In establishing this principle, Topanga effectively implements a
three-step process. First, an administrative agency must develop the “substantial evidence” in

1 the record. Second, the agency must ensure that its findings are supported by that evidence.
2 Finally, the agency's ultimate conclusions must be supported by the findings (and, therefore, the
3 evidence). Id.

4 A letter dated May 20, 2005, from John Robertus in response to NASSCO's prior
5 motion and letter dated May 12, 2005, correctly notes that the Regional Board may conduct a
6 hearing on a proposed action before any findings have been finalized. Regrettably, this rejoinder
7 completely fails to address Topanga's first step, which was the subject of NASSCO's letter and
8 motion, and confirms the staff's disregard of the most fundamental requirement: the ultimate
9 findings, whatever they may be, must be supported by substantial evidence. By failing to
10 provide NASSCO with any evidence supporting the Draft CAO, Regional Board staff has utterly
11 overlooked this requirement, frustrating the mandate of Topanga, and the opportunity for a
12 hearing becomes a meaningless exercise in futility.

13 **b. Due Process Compels Discovery**

14 By declining to provide the staff report, the Board simultaneously violates related
15 due process rights of NASSCO. See Mohilef v. Janovici, 51 Cal. App. 4th 267, 302 (1996)
16 ("[B]ecause the due process clause ensures that an administrative proceeding will be conducted
17 fairly, discovery must be granted if in the particular situation a refusal to do so would so
18 prejudice a party as to deny him due process.") (internal citations and quotations omitted). Since
19 the Regional Board has not released its staff report or any evidentiary basis for the Draft CAO,
20 and will not do so before the workshop or the deadline for the submission of written comments,
21 NASSCO is unable to address, either in writing or at the workshop, the manifest evidentiary
22 deficiencies contained in the Draft CAO.

23 This due process violation is compounded by the fact that the Draft CAO contains
24 glaringly different and totally unsupported findings and conclusions than those contained in the
25 September 2003 Sediment Report and the preceding sediment investigation plan. The Draft
26 CAO states that it is based on this Sediment Report. Indeed, the Sediment Report is the only
27 evidence that is even referenced in the Draft CAO and is the only credible evidence in the
28 administrative record. Yet, it is clear from the Draft CAO's content that it constitutes a striking

1 departure from both the Sediment Report (which was prepared at the direction of the Regional
2 Board staff) and the underlying sediment investigation plan (also directed by the Board), and
3 does not rely on any of the factual evidence compiled there. What remains a mystery to
4 NASSCO and other PRPs is what factual evidence the Board does purport to rely upon in issuing
5 the Draft CAO. Strikingly, despite having received the Sediment Report 18 months ago, the
6 Board has not developed or identified any other evidence. It is therefore not surprising that the
7 Board staff now refuses to identify the evidence purportedly relied upon in the Draft CAO in
8 advance of any public debate to address the Draft CAO, without which meaningful debate and
9 discussion will be impossible. The refusal to disclose any evidentiary basis creates the
10 inescapable impression that staff has utilized the last 18 months to massage the data gathered
11 during the Board-directed investigation as well as the assumptions necessary to reach a result
12 unsupported by any valid scientific evidence in the record developed during an exhaustive three
13 year study by Exponent.

14 Given the Draft CAO's radical departure from that investigative plan and the
15 exhaustively documented conclusions of the resulting Sediment Report, it is inconceivable that
16 any proceeding could be conducted by the Regional Board without providing NASSCO and
17 other PRPs the bases for the findings and conclusions contained in the Draft CAO. For the same
18 reasons, it is meaningless to submit written comments by June 15th in a complete evidentiary
19 void. Without a staff report setting forth in detail the evidence in a believable fashion why the
20 Sediment Report does not dictate a different outcome than the one reached by the Draft CAO,
21 the Regional Board cannot provide a meaningful opportunity for a hearing to either the PRPs or
22 to the Board itself. It is not clear to the PRPs and the public what, if any, evidence staff is
23 relying upon to purport to justify the seemingly unsupportable conclusions and findings of the
24 Draft CAO. Absent a meaningful opportunity, the Regional Board proceedings are not only a
25 denial of due process but are the equivalent of no hearing at all.

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1 **2. Any Workshop Conducted By The Board Must Be Protective Of**
2 **NASSCO's Statutory And Due Process Rights**

3 **a. The Proposed Workshop Will Compromise The Independent**
4 **Role Of The Board**

5 Regional Board staff is an adverse yet equal party to the PRPs in these
6 proceedings. Yet, by selecting the format of the workshop and limiting the amount of
7 information provided to the PRPs prior to the workshop, Board staff has impermissibly merged
8 their own role as advocates with the independent adjudicative role of the Board members. As
9 mentioned above, the Board members will be exposed to the Draft CAO's proposed findings and
10 conclusions. It is inconceivable that the Board would conduct a proceeding without first
11 revealing the evidentiary basis for those findings and conclusions. This undermines the ability of
12 the Board to be an independent arbiter and compounds the blatant procedural defects being
13 employed by staff. Board staff, though an adverse party, is directing the proceeding and the
14 Board. Because of this impermissible fusion, any workshop held prior to the full disclosure of
15 all evidence by Board staff must be conducted outside the presence of Board members.

16 **b. The Regional Board Must Provide NASSCO And Other**
17 **Potentially Responsible Parties Sufficient Time To Address**
18 **The Draft CAO**

19 At any proceeding in this matter, including any "workshop" or hearing, the PRPs
20 must receive sufficient time to present evidence regarding the Draft CAO. See Cal. Gov't Code
21 § 11425.10(1) (2005) ("The agency shall give the person to which the agency action is directed
22 notice and an opportunity to be heard, including the opportunity to present and rebut evidence.");
23 see also Matthews v. Eldridge, 424 U.S. 319, 333 (1972) ("The fundamental requirement of due
24 process is the opportunity to be heard at a meaningful time and in a meaningful manner."). The
25 amount of time to be provided to NASSCO at any workshop or hearing must correspond with the
26 complexity of the record, the enormous potential impact to NASSCO, as well as the extensive
27 defects and shortcomings of the Draft CAO. Anything less would fail to provide NASSCO with
28 an "opportunity to be heard" and would not be "meaningful." Because the proceedings are
adjudicatory, due process requires that NASSCO and the other PRPs receive at least the same

1 opportunity as Regional Board staff to address the woefully deficient Draft CAO (and at a
2 minimum an amount of time sufficient to constitute a meaningful opportunity to be heard). The
3 failure to do so, even after informing the PRPs of the “evidence” which staff purports to rely on
4 in ordering the unnecessary and unjustifiable expenditure of \$100 million, violates due process.

5 **c. NASSCO Must Be Allowed To Question Interested Persons**
6 **Presenting Evidence**

7 As discussed above, any proceeding on the Draft CAO in which Board members
8 are present is adjudicatory. Indeed, the workshop is an adjudicatory proceeding formally noticed
9 as a public hearing before the Board as decision-makers, masquerading as an informational
10 workshop. In any proceeding where Board staff (and potentially others) will be presenting
11 evidence in support of the Draft CAO to the Board itself, NASSCO demands the opportunity to
12 question any person that provides, in their comments, any testimony other than general policy
13 statements. Under the Government Code applicable to Regional Board adjudications, and
14 pursuant to regulations promulgated thereunder (23 Cal. Code Regs. § 648(b) (2005)):

15 Each party shall have these rights: to call and examine witnesses,
16 to introduce exhibits; to *cross-examine opposing witnesses* on any
17 matter relevant to the issues even though that matter was not
18 covered in the direct examination; to impeach any witness
regardless of which party first called him or her to testify; *and to*
rebut the evidence against him or her.

19 Cal. Gov’t Code § 11513(b) (2005) (emphasis added). It follows, then, that persons presenting
20 more than policy statements (e.g., witnesses) may be questioned. NASSCO reserves the right to
21 do so, and reserves all other rights afforded to a party under applicable law.

22 **III. CONCLUSION**

23 The Regional Board’s conduct represents an egregious violation of NASSCO’s
24 statutory and due process rights and the hollow, meaningless proceedings make a mockery of
25 those rights. In violation of Topanga’s first step, Board staff has not provided any evidence to
26 NASSCO supporting the Draft CAO, which results in no meaningful opportunity for NASSCO
27 to refute such (yet-to-be-disclosed) evidence, if it exists at all, either in writing or at any
28 workshop or hearing. The Regional Board has simply confirmed that the proceedings are

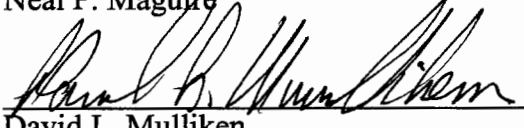
1 nothing more than a post hoc rationalization of a results-driven action.

2 For these reasons and those set forth above and in our previous motion, NASSCO
3 moves to compel a staff report (or an equivalent evidentiary basis) from the Regional Board
4 before any workshop or deadline for written comments. In addition, NASSCO renews its
5 insistence for at least an equivalent amount of time at any appropriately calendared workshop
6 (i.e., 90 days after provision of the staff report) to provide comments on the Draft CAO, respond
7 to the staff presentations (including questioning of witnesses), and address questions from the
8 Board members and public. If Board staff again declines to provide an evidentiary basis, the
9 June 29th workshop must be conducted outside the presence of Board members.

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11 Dated: June 1, 2005

Respectfully submitted,

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16 By 
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